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VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W. TW-A325
Washington, D.C. 20554

Re: EX PARTE
ET Docket 95-18

Dear Ms. Salas:

On behalf of the ICO USA Service Group ("IUSG"), this written *ex parte* presentation is submitted in the above-referenced proceeding involving the use of the 2 GHz bands for Mobile Satellite Services ("MSS"). It provides supplemental material to arguments set forth in the IUSG comments and reply comments in the above-referenced proceeding[1] and the more recent June 18, 1999 economic analysis prepared by Charles Rivers Associates Incorporated ("CRA"), and included in the *ex parte* submission of ICO Global Communications ("ICO") in this same proceeding dated June 18, 1999.[2]

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1 Comments of the ICO USA Service Group, ET Docket No. 95-18, at 33-35 (filed Feb. 3, 1999); Reply Comments of the ICO USA Service Group, ET Docket No. 95-18, at 35-36 (filed Mar. 5, 1999).

2 *See* ICO *Ex Parte*, ET Docket 95-18 (filed June 18, 1999) (including an analysis dated June 18, 1999 and entitled "An Economic Analysis of Regulatory Takings and Just Compensation with an

(continued...)

In its pleadings in this proceeding, the IUSG urged that to the extent the Commission continues to move forward with its relocation cost policies, the Commission not permit broadcast auxiliary services ("BAS") and fixed services ("FS") incumbent licensees to derive from MSS operators more compensation than they are reasonably entitled to receive for shifting to the Commission's new 2 GHz allocations. The IUSG agreed with other commenters that incumbent licensees should only be able to recover the depreciated basis of their equipment at the time of the actual relocation and that the Commission policy to require 2 GHz MSS entrants to provide for full replacement costs of the incumbents' facilities would confer an unjust financial benefit on incumbent licensees that would be contrary to the Commission's own objectives of merely leaving incumbents "no worse off" as a result of relocation.[3]

Similarly, the CRA Analysis also provides a compensation formula that would, if implemented by the Commission, result in incumbents being made neither better nor worse off as a result of the entry of MSS providers.[4] Noting that the Commission's existing relocation compensation policy generally results in overcompensation of incumbents, the CRA Analysis provides a thorough economic evaluation supporting the conclusion that the incumbents would be made whole by receiving compensation equal to the value of the remaining useful life of their existing equipment.

The IUSG fully agrees with the conclusions set forth in the CRA Analysis: *i.e.*, a compensation method based on the remaining useful life, or fair market value, of the incumbents' existing equipment satisfies the Commission's objective of leaving the incumbents in a position that is no worse off than where they stand today. In this regard, the depreciated value of equipment approach, advanced in the IUSG's comments and reply comments in this proceeding, can be employed as a surrogate for the remaining useful life approach set forth in the CRA Analysis. Both avenues for determining "fair compensation" are supported by overwhelming legal precedent. As shown below, the Commission's failure to consider these matters and re-evaluate its replacement cost relocation model — first adopted for localized PCS — in the context of the specific needs of MSS would be arbitrary and capricious.

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[2](...continued)
Application to Mobile Satellite Services") (the "CRA Analysis").

[3] *Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, First Report and Order and Further Notice of Proposed Rule Making, 11 FCC Rcd 8825, 8843 (¶ 32) (1996) ("*Microwave Relocation/Cost-Sharing First R&O and FNPRM*").

[4] The CRA Analysis assumes that incumbent licensees have property rights in spectrum, including perpetual rights of renewal. To the extent that these assumptions are invalid, any compensation to incumbents would be reduced.

I. DISCUSSION

A. Incumbents Should Be Made Whole, Not Better

In setting the rules for determining the costs of relocating BAS and FS incumbents, the FCC has announced that its goal is to "ensure that incumbents are no worse off than they would be if relocation were not required."[5] In this context, the US Government's policy of "just compensation," under the eminent domain doctrine,[6] provides the appropriate mechanism for determining precisely how this goal is to be achieved.[7]

In interpreting the "just compensation" requirement of the Fifth Amendment, the Supreme Court has sought to put the owner of the condemned property "in as good a position pecuniarily as if his property had not been taken."[8] The owner must be made "whole" but is not entitled to more.[9] The courts have further explained that in awarding "just compensation" no citizen has a right to "reap a windfall," as "overcompensation is as unjust to the public as undercompensation is to the property owner."[10] In short, the underlying policy of "just compensation" is to make the condemnee no worse off, and no better off, than before the property was condemned. This is, in fact, the Commission's stated policy as well.[11]

Providing "full replacement" facilities to incumbents, however, would leave them better off than the position they were in before. The full cost replacement of the incumbents' facilities would amount to a "windfall" if the substitute facilities are later sold, never acquired, or

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5 *Microwave Relocation/Cost-Sharing First R&O and FNPRM,* 11 FCC Rcd at 8843 (¶ 32).

6 Under the Fifth Amendment of the Federal Constitution, private parties are entitled to "just compensation" when the US Government takes their property.

7 The IUSG recognizes that incumbents do not have a property right on the public frequency spectrum - as such, their relocation is not a "taking." For this reason, however, the formulation of "just compensation," under the doctrine of eminent domain, is more beneficial to incumbents as it provides a conservative, maximum compensation amount in their favor.

8 *United States v. 564.54 Acres of Land,* 99 S.Ct. 1854, 1857 (1979) ("*Lutheran Synod*") (citing *Olson v. United States,* 292 U.S. 246, 255 (1934)).

9 *See Olson,* 292 U.S. at 255.

10 *United States v. 69.1 Acres of Land,* 942 F.2d 290, 292 (4th Cir., 1991).

11 *See Microwave Relocation/Cost-Sharing First R&O and FNPRM,* 11 FCC Rcd 8825, 8843 (¶ 32) (1996).

converted to another use.[12] Indeed, even if the incumbents never sell or convert to another use the substitute facilities, the mere replacement of old with new equipment would also be a windfall since replacing old with new equipment would result in equipment that is better and that will last longer.[13] As the CRA Analysis demonstrates, the FCC's insistence for replacement costs of comparable facilities would be "more" than what the incumbents have in the first place. Thus, the provision of "comparable facilities"[14] is inconsistent with the Supreme Court's notion of "just compensation."

B. MSS Entrants Should Compensate Incumbents Based On The Remaining Useful Life (or Depreciated Value) of Their Facilities

As stated above, if the MSS entrants are to provide "just compensation" to incumbents that have to be relocated, the incumbents should only be expected to be made "whole." The Supreme Court has stated that a party is made "whole" when he or she receives the "fair market vale" of the condemned property. This approach is applied when there is a market for the particular product, even if such market is not extensive.[15] Further, the Court has defined "fair market value" as "what a willing buyer would pay in cash to a willing seller" at the time of the taking.[16] Accordingly, in order for the MSS entrants to make the incumbents "whole," the entrants need only to provide for the fair market value, at the time of the relocation, of the incumbents' facilities that need to be relocated.

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12 *See Lutheran Synod*, 99 S.Ct. at 1859.

13 *See id.* at 1860 (White, J., concurring). *See* also CRA Analysis at 8-11.

14 The Commission has essentially defined "comparable facilities" as encompassing the "full replacement costs" of the licensee's existing equipment.

15 For example, in *Lutheran Synod*, the Court found a market for summer camps. *See Lutheran Synod*, 99 S.Ct. at 1858. Another measure of compensation is the cost of developing substitute facilities — but, in cases when the condemnee is a private party, rather than a public entity, the Court has noted that even if the cost of substitute facilities exceeds the market value of the condemned property, the measure of compensation is market value because the private entity is "free to allocate its own resources." *Id.* at 1859. In cases when the condemnee is a local governmental entity that has a duty to replace the condemned facility, the Court in *United States v. 50 Acres of Land*, 105 S.Ct. 451 (1984), stated that a public condemnee is not entitled to compensation measured by the cost of acquiring a substitute facility when the market value of the condemned facility is ascertainable, notwithstanding that the condemnee has a duty to replace the condemned facility. *See id.* at 453.

16 *Lutheran Synod*, 99 S.Ct. at 1857 (citing *United States v. Miller*, 317 U.S. 369, 374 (1943)).

Implementation of this court mandated compensation formula by CRA shows that the incumbents are made "whole" by receiving compensation equal to the value of the remaining useful life of their existing equipment.[17] If the Commission were to require entrants to pay incumbents more than this amount, it would violate its stated goals of making incumbents neither better nor worse off, not to mention contradict a long-line of Supreme Court precedent.[18]

While not an exact substitute, the value attributable to the remaining useful life of the incumbents' existing facilities can most readily be determined by the incumbents' own records reflecting the depreciated value of their equipment.[19] Indeed, the use of depreciated value as a measure of "just compensation" has precedential support.[20] Far from leaving incumbents "no worse off," as the Commission envisions, payment of funds in excess of book value of equipment would result in a financial "windfall" to incumbents that would be a taxable receipt of profit.

It is thus not true, as the Commission asserted in its Microwave Relocation/Cost Sharing[21] proceedings, that compensating incumbents for the depreciated value of their equipment would not enable incumbents to construct comparable replacement systems.[22] The very meaning of depreciation is that new facility costs are "reserved" each year through tax benefit depreciation such that the owner has already recovered the full cost of the facility when it is fully depreciated. Thus, incumbents will be fully able to fund purchases of new equipment by combining any sums received from 2 GHz MSS licensees as reimbursement for depreciated equipment with the tax benefits of earlier write-offs. Moreover, considerations beyond "fair market value," which are excluded from the formulation of "just compensation" in takings of

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17 *See* CRA Analysis at 11.

18 *See id.* at 4-5, 11.

19 As noted above, a compensation method based on the depreciated value of equipment can be used as a surrogate for a compensation method based on its remaining useful life.

20 *See Harry S. Schoeffel et al, d/b/a Olympic Hot Springs Co. v. United States*, 193 Ct. Cl. 923, *937 (U.S. Ct. Cl., 1971) (reasoning that plaintiffs will be made whole by payment of the remaining undepreciated book value of their property interest, having enjoyed the tax advantages of depreciation pursuant to which they have written off their investment for tax purposes and lowered their income subject to income tax).

21 *Microwave Relocation/Cost-Sharing First R&O and FNPRM*; Second Report and Order, 12 FCC Rcd 2705 (1997) (together, "Microwave Relocation/Cost-Sharing").

22 *See Microwave Relocation/Cost-Sharing First R&O and FNPRM*, 11 FCC Rcd 8825, 8844 (¶ 34).

property by the US Government,[23] are just as invalid here where the FCC is mandating the relocation of incumbents to make room for a new service in the 2 GHz bands for the benefit of the public. As is the case of governmental property condemnations, considerations of the incumbents' expenses in replacing their facilities are subjective and should not be considered as part of the formulation of "fair market value."[24] Additionally, the frequency spectrum is a public resource that the FCC must regulate in a neutral manner. As such, requiring incumbents to contribute their own share beyond the market value of their existing equipment in order to operate in different parts of the spectrum would be the price they pay for being in business and their part of the burden of "common citizenship."[25]

In short, the Commission's current equipment relocation cost reimbursement policy must be changed in order to achieve the Commission's announced policy objective of only making the incumbents "whole." The Commission should use the CRA method to calculatethe fair market value of incumbents' equipment or, alternatively, the surrogate method based on the depreciated value of that equipment.[26] The use of either of these relocation cost

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23 *See Lutheran Synod*, 99 S.Ct. at 1857 (stating that "fair market value" excludes other considerations such as an owner's special value for a particular use and that loss due to a particular use is treated as the burden of common citizenship).

24 *See id.* at 1859-60 (stressing that monetary burdens an owner would have to incur, to continue the owner's particular needs, are outside the objective measure of "fair market value"). The Court in *Lutheran Synod* recognized that "it is not unusual that property uniquely adapted to the owner's use has a market value on condemnation which falls short of enabling the owner to preserve that use." *Id.* But the Court stressed that "nontransferable values arising from the owner's unique need for the property are not compensable." *Id.* at 1859. *Cf. Implementation of Section 302 of the Telecommunications Act of 1996 — Open Video Systems*, 11 FCC Rcd 18223, 18335 (¶ 221) (1996) (recognizing that the measure of "just compensation" is only the value of the property taken).

25 *See Lutheran Synod*, 99 S.Ct. at 1857 (citing Justice Frankfuter in *Kimball Laundry Co. v. United States*, 69 S.Ct. 1434, 1437 (1949)). *See also* CRA Analysis at 3-4.

26 In addition to the other compelling reasons for changing its policy, the Commission should take note that reimbursement based on depreciated value will serve the interests of all parties to 2 GHz MSS relocation negotiations by simplifying the negotiation process. An incumbent that presents a relocating MSS licensee with proof of the depreciated value of equipment requiring relocation may be able to obtain reimbursement without resort to any negotiations at all. The use of depreciated values will also aid in resolving any disputes that may arise as to whether an incumbent licensee has received facilities comparable to those it previously operated.

approaches will prevent a windfall to the incumbents, while leaving them neither better nor worse off.[27]

C. The Commission Should Change Course From That Followed in Prior Proceedings

The underlying facts of the Emerging Technologies[28] and Microwave Relocation/Cost-Sharing proceedings (together, "ET/Microwave"proceedings) and the financial implication of the Commission's rulings have changed markedly and are no longer applicable in the context of 2 GHz MSS. Indeed, our review of the comments submitted during the ET/Microwave proceedings indicates that while some new entrants in the ET/Microwave proceedings were concerned that incumbents would get a windfall from the "full replacement cost" reimbursement of their equipment, these entrants did not set forth in-depth arguments in this respect.[29] In general, there was little discussion in the comments in the ET/Microwave proceedings discussing the issue, or in the Commission's rulings, and the FCC merely determined without analysis that "the depreciated value of old equipment should not be a factor when determining comparability."[30]

But the balance of equities has shifted since the PCS model was adopted. Unlike the facts leading to the eventual ET/Microwave rulings, here, the health, and perhaps the viability, of 2 GHz MSS depends on a revised and just equipment replacement cost policy. Unlike the situation in the ET/Microwave proceedings, where there were many new entrants, the

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27 In this regard, it is important to note that this formula provides an upper limit to incumbent compensation since they have no "property rights" to the spectrum.

28 *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, First Report and Order and Third Notice of Proposed Rule Making, 7 FCC Rcd 6886 (1992); Second Report and Order, 8 FCC Rcd 6495 (1993); Third Report and Order and Memorandum Opinion and Order, 8 FCC 6589 (1993); Memorandum Opinion and Order, 9 FCC Rcd 1943 (1994); Second Memorandum Opinion and Order, 9 FCC Rcd 7797 (1994), *aff'd*, Ass'n of Public Safety Communications Officials-International, Inc. v. FCC, 76 F.3d 395 (D.C. Cir. 1996) (together, "Emerging Technologies").

29 A significant number of filings, encompassing both incumbents and PCS entrants, were reviewed to determine what arguments were presented to the FCC with respect to the use of depreciation in calculating relocation costs. It appears that PCS entrants generally supported the full reimbursement defined "comparable facilities" only in response to a proposed statute which was concerned with the reliability and cost of the incumbents' communications networks. *See* Comments of American Personal Communications On Third Notice of Proposed Rule Making, ET Docket 92-9, at 2 n.5 (filed January 13, 1993).

30 *Microwave Relocation/Cost-Sharing First R&O and FNPRM*, 11 FCC Rcd at 8844 (¶ 34).

Commission must remember that, in the case of the instant relocation, a handful of 2 GHz MSS licensees will be held responsible for relocating the facilities of a host of incumbents throughout the United States. Thus, what might have once been considered a minor inaccuracy in the calculation of equipment costs with respect to a single incumbent FS licensee in the Commission's Microwave Relocation/Cost Sharing proceedings will be multiplied thousands of times over for 2 GHz MSS licensees, and will quickly become an unmanageable financial burden.

For example, in the case of PCS, the impact of relocation is purely local and related more or less directly to the service requirements of the entering emerging technology licensee. Thus, business decisions by the entering licensee can be made on an economically efficient basis — a tradeoff is undertaken between bandwidth, need, and any resulting relocation obligation. In the case of 2 GHz MSS, on the other hand, service is considered nationwide — indeed, global. There is a service rule requiring both national and global coverage, but relocation obligations are tied to the least common denominator: *i.e.*, to serve one user in a rural area of New Mexico, for example, incumbent BAS and FS licensees in the entire Western US would need to be relocated. Thus, relocation obligations, unlike the PCS model, are not tied to anticipated revenue resulting from that relocation. As a consequence, 2 GHz MSS cannot be regulated based on the same financial and commercial considerations as pertained in the case of PCS. These are all significant facts that differ from the ET/Microwave rulings which mandate that the FCC reassess its existing relocation compensation cost policy.[31]

Rather than adhering to a fundamentally unjust position, the Commission should adjust the earlier judgment in light of the changed conditions where as here, new facts and new considerations, warrant such reassessment. The depreciation model adopted during the ET/Microwave proceedings was a first effort – as such, it is not immune to improvements and refinements as the public interest requires.

In fact, modification of the model is all the more important, as the current model would require American consumers to pay twice: once for the tax deductions already taken on incumbent licensees' equipment, and a second time in higher MSS prices. The Commission should consider all these new facts in the instant 2 GHz MSS proceedings.

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31 *See Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 966, 970 (D.C. Cir. 1999) (remanding a Commission rule because "[t]he Commission did not think seriously about the question whether wide-area incumbent SMR licensees are in fact sufficiently different from EA, cellular and PCS licensees that disparate regulatory treatment is warranted" in view of a new statute that required the FCC to treat all similarly situated commercial licensees comparably) (emphasis added).

In this regard, the IUSG notes that the Commission consistently reassesses as its policies in view of changed circumstances. For example, the Commission periodically reconsiders its rules as part of its biennial review to identify regulations that are overly burdensome or no longer serve the public interest.[32] Likewise, the Commission should also reassess its relocation compensation rules which would be overly burdensome to 2 GHz MSS entrants. In the instant 2 GHz MSS proceedings, for example, the FCC is implicitly predicting that the same financial implications that were applicable to the ET/Microwave proceedings also apply to the 2 GHz MSS. But as demonstrated above, substantially changed conditions from the ET/Microwave proceedings invalidate these assumptions. The FCC has an obligation to reconsider its policies and determine anew whether the cost burdens assessed in the ET/Microwave proceedings would be erroneous in the instant case.[33] Indeed, the Commission is not only entitled to revise its rules in view of the public interest as it exists today,[34] but is obliged to consider the foregoing substantial arguments to the case at hand.[35]

II. CONCLUSION

In sum, BAS and FS incumbents should not expect more than "just compensation," irrespective of who pays. As is the case in eminent domain cases, the formula for "just compensation" to cover the relocation costs of incumbents should be "fair market value" of the equipment to be replaced — that is, incumbents should expect to receive no more, and no less, than the value of the remaining useful life of their equipment. The factual circumstances surrounding the ET/Microwave rulings and the instant 2 GHz MSS proceeding differ greatly

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32 *See 1998 Biennial Regulatory Review*, Report and Order, IB Docket No. 98-118 (FCC 99-51), slip op. at 2 (¶ 3) (released March 23, 1999).

33 *See Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991) (noting that the FCC has an obligation to reconsider when its predictions are erroneous).

34 *See Black Citizens For A Fair Media v. FCC*, 719 F.2d 407, 411 (D.C. Cir. 1983) (stating that "the FCC is entitled to reconsider and revise its view as to the public interest and the means needed to protect that interest"). The Commission must also bear in mind that its relocation cost reimbursement policies are being watched closely by foreign administrations, and that the failure to correct the existing flaw in those policies may give foreign administrations throughout the world license to impose on 2 GHz MSS system operators the duty of buying new equipment for incumbents who are not entitled to such windfalls. Such burdens would cripple 2 GHz MSS, thus depriving consumers — including unserved and underserved areas and populations — of much needed communications capability.

35 *See AT&T Corporation v. FCC*, 86 F.3d 242, 246 (D.C. Cir. 1996) (directing the FCC to reconsider a serious argument that the Commission had given cursory treatment).

with substantial implications for the 2 GHz MSS entrants. The Commission must consider the foregoing facts and arguments in order to develop fair relocation compensation policies; otherwise, the Commission would be acting in an arbitrary and capricious manner [36] and overburden 2 GHz MSS to such an extent as to endanger affordable services to the public, or the provision of any 2 GHz MSS services at all.

* * *

Pursuant to Section 1.1206(b)(1) of the Commission's Rules, an original and one copy of this letter are provided to the Secretary for inclusion in the record.

Respectfully submitted,

Norman P. Leventhal
by PAB

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36 *See Citronelle-Mobile Gathering, Inc. v. Mc Lucas*, 432 F. Supp 821, 827-828 (S.D. Alabama, 1977) (declaring an FAA rule as an arbitrary and capricious act because the FAA failed to investigate and consider the relevant facts). *See also Arent v. Shalala*, 70 F.3d 610, 616 (D.C. Cir. 1995) (stating that an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts and the choice made") (quoting *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 43 (1983)).